Supreme Court, U. S.
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IN THE

Supreme Court of the United States

October Term, 1977

No. .....

76-1307

NAVAJO FREIGHT LINES, INC., a corporation,

Petitioner,

vs.

VACCO INDUSTRIES, a California corporation,

Respondent.

Petition for Writ of Certiorari to the Court of Appeal, Second Appellate District, State of California.

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SUBJECT INDEX

	Page
Opinion Below	2
Jurisdiction	2
Questions Presented	3
Statement of Facts	7
Reason for Granting the Writ	13
Conclusion	16

TABLE OF AUTHORITIES CITED

Cases

Elder and Johnson Company v. Commercial Motor Freight, Inc., of Indiana (Court of Appeals for Montgomery County, 1953) 94 Ohio App. Rep. 358	13
F. J. McCarthy, Inc. v. Southern Pacific Company (U.S. Court of Appeals, 9th Circuit, Jan. 15, 1970) 428 F.2d 690	14
Hadley v. Baxendale, 9 Ex. 341, 156 Eng. Rep. 945, 5 Eng. Rul. Cas. 502 (1854)	14

Statutes

United States Code, Title 28, Sec. 1257(3)	2
United States Code, Title 49, Sec. 20(11)	2
United States Code, Title 49, Sec. 319	2

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Petition for Writ of Certiorari to the Court of Appeal, Second Appellate District, State of California.

To the Honorable Chief Justice and Associate Justices of the United States Supreme Court:

This is an action against a common carrier on a freight claim arising from a shipment in interstate commerce.

Petitioner, Navajo Freight Lines, Inc., the defendant and appellant below, respectfully prays that a Writ of Certiorari issue to review a decision of the Court of Appeal, Second Appellate District, State of California, filed October 29, 1976. Petition for rehearing in said court was denied. Petition for hearing in the Supreme Court of California was denied on December 22, 1976.

The decision for which review is sought will be published in the official reports of California at 63 Cal.App.3d 262. There are only advance sheets present-

ly published, the bound volume not yet having been published. This decision affirmed the judgment of the Superior Court of the State of California for the County of Los Angeles originally rendered in favor of plaintiff and respondent, Vacco Industries, Inc., in the amount of $54,241.95 plus pre-judgment interest and costs, but in error cited in said opinion at page 2 thereof, as $57,241.95 plus pre-judgment interest and costs. See the Clerk's Transcript certified as a part of the record in connection with this petition, pages 20 and 21.

Opinion Below.

The opinion of the Court of Appeal, Second Appellate District, State of California, filed October 29, 1976, is printed in Appendix "A" annexed to this petition. The Order sought to be reviewed is set out in said opinion. Also printed in Appendix "A" is a copy of the Order by said court denying rehearing. A copy of the Order by the Supreme Court of California denying a hearing dated December 22, 1976, is also printed in Appendix "A".

Jurisdiction.

The statutory provision which confers jurisdiction to review the judgment or decree in question by Writ of Certiorari is found at 28 U.S.C. Sec. 1257(3). The Carmack Amendment to the Interstate Commerce Act, 49 U.S.C. Sec. 20(11) is the statute of the United States determining the rights of the parties. This statute is made a part of the Motor Carrier Act by 49 U.S.C. Sec. 319. Some of the federal questions were initially raised in the trial court in the

responsive pleading to the complaint [C.T. pp. 6-10, line 17]. During the trial the defendant, Navajo Freight Lines, Inc., appellant here, presented its Trial Memorandum of Points and Authorities to the trial court which reviewed the federal questions involved in the trial as they were then conceived [C.T. pp. 43-66, Incl.]. The federal questions involved were next reviewed in Objections to Proposed Findings of Fact and Conclusions of Law and Proposed Judgment [C.T. pp. 115-135, Incl.]. The federal questions were next reviewed in the trial court in Defendant's Points and Authorities in Support of Motion for New Trial [C.T. pp. 143-155, Incl.]. All of the documents filed in the Court of Appeal and Supreme Court of California, which are a part of the certified record herein, reflect the federal questions involved in this matter.

Questions Presented.

(1) To what extent, if at all, does the presumption of negligence doctrine apply in an interstate motor freight common carrier case when a clear receipt for the freight on delivery is given by the consignee of an interstate shipment and thereafter, after extensive rehandling of the shipment by the consignee prior to unpacking, damage to the contents on unpacking is first discovered?

(2) In an interstate motor freight common carrier case when a clear receipt is given by the consignee to the carrier on delivery and damage to the contents is discovered after extensive rehandling by the consignee thereof, must the plaintiff rule out damage by the consignee as the result of the rehandling of the shipment after delivery?

(3) In an interstate motor freight common carrier case when a clear receipt is given by the consignee to the carrier at the time of delivery of the freight and the consignee rehandles the shipment extensively before damage to the contents is discovered on unpacking, may opinion evidence of defendant's expert given after reviewing photographs only of the appearance of the contents of one of the two crates containing damage on unpacking in which the expert concluded that the shipment was improperly packaged and that the damage resulted to the center section because of vibration as the result of said improper packaging be used by the trial Court to establish that the damage to the center section occurred before delivery to the consignee so as to invoke the application of the doctrine of presumption of negligence and impeach the evidence of good condition at the time of delivery established by the clear receipt given by the consignee for the freight at delivery?

Can such evidence be so used when the Court concludes that despite the testimony of such expert indicating no drop in transit, the Court decides to believe the opinion evidence of plaintiff's experts who concluded the damage resulted to such center section by a drop of such piece of freight at a corner thereof in transit prior to delivery even though there was no distortion of the crate consistent with a drop at such corner?

(4) In an interstate motor freight common carrier case in which a clear receipt was given on delivery of the freight to the consignee and thereafter damage to the contents was discovered only after extensive rehandling of said shipment by the consignee may

the physical evidence that damage to a crate had to have occurred at the very point at which the damage was observed by plaintiff's witness three days after delivery be overcome by general evidence that the shipment was handled with due care after delivery, when such evidence does not explain how the shipment could be handled after delivery with the damage to the container existing to the place at which damage to the crating was observed nor does it explain how the damage observed occurred to the crate containing the left hand section of the console carried?

(5) Should defendant's motion at the conclusion of plaintiff's case for nonsuit on the basis that plaintiff had not established a *prima facie* case have been granted by the court, and was the court's denial of the motion proper?

(6) Was the center section improperly packed for shipment?

(7) Does the testimony of the expert witness for defendant, Navajo Freight Lines, Inc., that the damage to the center section resulted from resonance vibration induced in the center section by normal truck operations over the road impair the effect of the clear receipt obtained by the defendant, Navajo Freight Lines, Inc., from the Naval Air Station at the time Navajo delivered the shipment?

(8) Does the showing of the assembled cabinet to Navajo's freight salesman before preparing it for shipment and showing the shipment to Navajo's freight salesman after crating it with the solid wood crates used in this case, absolve the shipper of its duty to properly prepare the items for freight shipment?

(9) In an interstate motor freight common carrier case when a clear receipt is given by the consignee to the carrier on delivery and after extensive rehandling of said shipment by the consignee the shipment is unpacked and damages to the contents of two of the four pieces of freight are discovered, must damages to the different pieces of the same shipment resulting from different causes be segregated and apportioned according to the court's conclusion of the party at fault regarding the damage to each such piece of freight?

(10) In an interstate motor freight common carrier case when a clear receipt is given on delivery of the freight and damage is discovered after extensive rehandling of said shipment by the consignee and the entire shipment is returned all the way across the United States to the point of manufacture for repair, in computing the repair charges, when the direct material costs amount to approximately $7,000.00, direct incidental costs amount to approximately an additional $5,000.00, and the direct labor costs amount to approximately another $8,000.00, may an additional burden of 200% of direct labor costs, an amount of approximately $16,000.00, be charged to bring the direct costs and burden to $32,000.00 after which a 35% general and administrative expense charge is then assessed to bring the charges to approximately $49,000.00 and then a 10% profit item be charged in addition when the common carrier is not notified at the time the shipment is received and the bill of lading contract entered into that if the shipment is damaged in transit such special damages will result?

(11) In an interstate motor freight common carrier case when the trial court concludes that the interstate

carrier is responsible for the damage and the court awards plaintiff the cost of returning the shipment to the place of manufacture:

(a) Is it proper to also charge the motor freight common carrier with the full cost of returning the repaired shipment to the consignee by van lines when the cost of delivery is approximately twice the amount the original freight carrier charged for delivery of the freight shipment originally and when the air ride suspension service offered by the van lines was an altogether different type of service than the freight service offered initially by the defendant common carrier?

(b) Was it proper to charge the carrier as an element of damage to the shipment the charges assessed by Wylie Laboratory of $500.00 to investigate the cause of the damage at destination when the shipper had already sent its engineer to the destination of the shipment to investigate and report on such causes and his report was in evidence?

(c) Was it proper for the court to have allowed a general and administrative charge of 35% and a 10% profit item to be added to the expenses incurred by plaintiff away from their own plant in fixing damages against a motor freight common carrier handling an interstate shipment of freight?

Statement of Facts.

This lawsuit was initiated by the claimant and shipper, Vacco, after the common carrier, Navajo, declined the freight loss and damage claim in writing. The claim arose after a shipment was made by Vacco from its plant in South El Monte, California, via Navajo, which was and is a motor freight common carrier in interstate commerce, of three wooden crates and one wooden

box, weighing 11,760 lbs., on September 25, 1970, to the U.S. Naval Air Station at Quonset Point, Rhode Island. This was of a one of a kind lube pump test stand of the dimensions when assembled of 6½ feet in height, 9 feet deep and 11 feet wide, which was disassembled into three sections for shipment and installation. These were two side sections, each approximately 3 feet wide, each with one side open, and a center section approximately 5 feet wide with both sides open. The remaining dimensions were the same as when the unit was assembled. Vacco's copy of the bill of lading was marked Plaintiff's Exhibit 16 and admitted into evidence [C.T. p. 235]. Navajo's copy of the bill of lading was admitted into evidence as Exhibit G [C.T. pp. 241-242]. The shipment was delivered by Navajo at the U.S. Naval Air Station at Quonset Point, Rhode Island, on October 5, 1970, and signed for without exception noted on the delivery receipt to the good condition of the three crates and one box by the U.S. Naval Air Station Receiving Clerk, William Lipscomb [C.T. p. 248]. The depositions of the said William Lipscomb and of Anthony Zangari, the delivering driver for Navajo Freight Lines, were taken in the vicinity of Quonset Point prior to the trial of this matter and were introduced at the trial as a portion of the Court Exhibit. The said Court's Exhibit is not a part of the record on appeal in support of this Petition for a Writ of Certiorari. This Court can order such exhibits forwarded by the Clerk of the Superior Court for the County of Los Angeles, Exhibit Room, Superior Court, County Courthouse, 111 No. Hill Street, Los Angeles, California, telephone number (area code 213) 974-1234 (ask for clerk of exhibit room, Superior Court, in case Number C 42419). Of the four pieces containing the shipment,

the container, called a "crate," but actually a solid wooden box, containing the center section, the bottom of which was a platform mounted on skids, weighed approximately 6000 lbs., including contents. Each of the side sections of the console was also enclosed in a solid wooden box, each of which weighed approximately 3000 lbs. including contents. The fourth solid box was small and contained parts weighing approximately 400 lbs. as packed. The shipment was loaded at the shipper's place of business on a flatbed truck in the shipper's parking lot because the shipper had no freight dock and the shipment had to be loaded from ground level. The shipper's own personnel operated the forklifts by which the shipment was loaded onto the carrier's truck. The shipment was carried from the shipper's place of business in South El Monte to the carrier's terminal in Los Angeles, at which the shipment was transferred so that the several pieces of the shipment were each loaded on a separate van trailer bound for Cleveland, Ohio, except that two of the four pieces were loaded on the same van. On arrival at Cleveland the shipment was off loaded from the several vans on which it arrived and again consolidated on the single van trailer on which the entire shipment was actually delivered at Quonset Point [C.T. pp. 248-252]. Receiving personnel employed by the Navy unloaded the shipment from the Navajo delivering van after its inspection and the signing of a clear receipt on delivery which was given to the Navajo driver by the Naval Receiving Clerk, William Lipscomb [C.T. p. 248]. Each of the crates was pulled off the incoming van by Navy personnel and equipment at the Navy unloading platform by a hook attached to a cable placed around a piece of freight, the cable being attached to a forklift truck and after the piece

of freight was dragged off the truck the Navy forklift operator put the prongs of the forklift under one side of the crate and dragged the crate inside the receiving building for storage [Court's Ex. 1, Deposition of Joseph Rega, pp. 2-7, Incl.]. Thereafter on the day that the rework facility notified the receiving building it was ready to receive the crates, the inside forklift operated by Navy personnel again dragged each of the crates out to the loading platform and then they were picked up by an outside forklift operated by Navy personnel from dock height, transported one-half mile and around a sharp corner and then delivered at the Naval rework facility, where the items ultimately were to be used, and deposited in the paved area outside the building at ground level [Court's Ex., Deposition of Joseph Rega, pp. 22 and 23]. The large crate containing the center section was left outside the building and was uncrated at that location. The other three pieces of the shipment were transported into the inside of that building. Naval personnel with crowbars pried apart the crate left outside the building containing the center section, then when the center section was uncovered, extensive damage was noted in the collapse of the top of said section where heavy accumulators not supported from below attached to the top were sagging down and came in contact with other portions of the center section below them. This unpacking of the center section was done on October 7, 1970, two days after delivery of the shipment to the Navy by Navajo, and on October 8, 1970, the damaged center section was seen by a Gerard Raymond, freight salesman for Navajo Freight Lines at Providence, Rhode Island, and Steven J. Buchanan, the design engineer for Vacco on this project who was called back to Quonset Point to view the damage and arrived

the day after its discovery. The testimony of Gerard Raymond taken by deposition at Quonset Point is also a portion of Court's Exhibit and is not a part of the record certified by the Clerk in connection with this Petition for Writ of Certiorari. Steven J. Buchanan viewed the shipment, including the crates which had not been unpacked and the crate containing the center section, which had been unpacked. Six days after he first saw the shipment, on October 14, 1970, after he returned to South El Monte, he prepared a written report which contained his version of the damage to the shipment and its causes. This report was admitted into evidence over objection [R.T. p. 121] as Plaintiff's Exhibit 4 during trial [C.T. pp. 167-169 Incl.]. On page 2 of said report, damage to the crate containing the left hand section is described by Buchanan. The crate of the unit was "completely broken away from the skid," and resting flat on the ground at the time he first saw it at destination [R.T. Vol. I, p. 100, lines 12-24 Incl. and pp. 186 and 187]. When he had last seen this crate at origin the bottom of the crate was nailed to the side edge of the skid so that the bottom of the crate was approximately six inches off the ground. At the time Mr. Buchanan saw the crate at destination the bottom of the crate had slid over the contents and over the skid and rested flat on the ground. This had to occur at the point at which this was observed since the crate could not be handled normally by forklift in this condition. The testimony of Mr. Rega was that the crate was handled by forklift by the Navy prior to its placement where it was observed by Mr. Buchanan. The crate damage observed could not have occurred when the shipment was carried by Navajo because it could not have been handled by forklift by the Navy in such

damaged condition prior to its placement at the rework facility without extraordinary measures having been taken in such handling and nc such measures are described by anyone involved in the handling of the crates.

When Mr. Buchanan was at Quonset Point on October 8, 1970, he made no inquiry to determine whether the cabinet work could be repaired on the East Coast in the vicinity of the Naval Air Station, nor did he go into the question of repairing the damage at destination [R.T. Vol. I, p. 193, line 16, to p. 195, line 4]. All the crates, including the crates for undamaged sections, were repacked by the Navy and sent back to Vacco at South El Monte for repair. There was a one-year warranty on the operation of the item which Vacco had in its original contract with the Navy [R.T. Vol. II, p. 372, line 20, to p. 373, line 24]. Vacco made a freight claim against Navajo and filed it in the amount of $76,503.43 [C.T. p. 225]. Vacco never spent the $14,000 on the Borg-Warner drive system, included as a part of its claim as estimated loss, and that item was eliminated in the judgment as awarded by the court [R.T. Vol. I, p. 285, line 10, to p. 286, line 7]. The judgment by the court included large indirect costs which were added to direct costs and direct labor. To the direct labor costs there was first added an amount equal to 200%. This was described as indirect burden and as the indirect labor costs. To the total direct costs and direct and indirect labor costs there was added a 35% general and administrative expense, which included selling expense. To the result thus obtained there was added a 10% profit item.

REASON FOR GRANTING THE WRIT.

The Supreme Court of the United States ought to grant the Petition for Writ of Certiorari in this matter and consider the questions presented for a number of reasons.

Although the liability questions involved in this case are not like the questions most frequently reviewed in transportation cases, since we have a clear receipt given the carrier on delivery followed by extensive rehandling of the shipment by the consignee prior to the unpacking of the shipment and discovery of the damage in two of the four pieces of freight, an opportunity is afforded for needed re-examination and further definition of the presumption of negligence as it applies in transportation cases.

Contrast the law as to the presumption of negligence in transportation cases as cited in *Elder and Johnson Company v. Commercial Motor Freight, Inc., of Indiana* (Court of Appeals for Montgomery County, 1953) 94 Ohio App. Rep. 358, at p. 360, with the view of the Court of Appeal in the instant case in 63 Cal.App.3d 262 in which, at page 271 of its opinion it finds that some evidence of due care in handling the shipment after delivery is enough to reasonably conclude that due care was exercised by the consignee in handling the merchandise. Evidence of handling which does not account for or explain observed damage to the shipping crate after handling by the consignee, which could not have been present at delivery by the carrier to the consignee, as compared to general evidence that the shipment was handled with due care after its receipt by the consignee is not evidence upon which the lower court could "*reasonably* conclude that due care was

exercised by the consignee in handling the merchandise."

In the matter of procedure, the right of discovery as it applies to defendant's expert witnesses prior to trial needs to be considered in the light of the defendant carrier's fundamental right not to have to proceed with any evidence until the plaintiff has established a *prima facie* case.

Important questions as they affect freight interstate carriers are presented with respect to damages. At page 274 of its opinion, the Court of Appeal stated "It seems reasonable, though, that the allocation of such costs (referring to overhead and general and administrative costs) over the direct costs of manufacturing should be gauged in the context of the established practice of the individual business, as well as the particular industry of which that business is a part." To allow a particular shipper, or a particular industry to recover large indirect burdens and to add general and administrative expense and profit elements when the carrier is not presented with notice at the time the shipment is made that damage to the shipment will involve such items in addition to actual repair costs, is a violation of the special damage rule as originally set out in *Hadley v. Baxendale,* 9 Ex. 341, 156 Eng. Rep. 145, 5 Eng. Rul. Cas. 502 (1854), as that rule has been considered in subsequent American cases. See *F. J. McCarthy, Inc. v. Southern Pacific Company* (U.S. Court of Appeals, 9th Circuit, Jan. 15, 1970) 428 F.2d 690, at page 693. Particularly, in the field of the law as it pertains to common carriers, the acknowledgment of damages on the basis of what is usual within a government contract industry, when accounting within that industry has been developed in its overhead and general and administrative expense aspects to an esoteric basis not commonly used among sellers and shippers of machinery, is to permit discrimination in favor of that industry. The National Motor Freight Classifications of machinery items are made according to use. To permit a further breakdown within a use classification as between machines in that use class manufactured or shipped by a non-government contract industry as compared to machines in that classification manufactured by a government contract industry and to permit the latter to recover damages which in both nature and amount would be classified as special damages and not collectible if recovery is sought for such damages in the non-government contract industry division would permit the carrier to discriminate among its customers according to the industry of which the shipper was a part.

The language of the Carmack Amendment, citation *supra,* is to permit the claimant to recover the full actual loss to the *property transported.* This is not or should not be regarded as the same as damages suffered by the claimant or damages resulting to the claimant's business. The carrier does not base its charges on a portion of a shipper's overhead or a portion of the shipper's general and administrative expense. The carrier is not in the business of underwriting insurance for intangible aspects of a claimant's business. It carries freight classified within a particular class by use at the same rate per unit of weight for all products being shipped within that class under the same circumstances.

To have to consider, in addition to the use made of a product, who is doing the shipping and base its charges upon distinctions among shippers, would

be to require the re-ordering of classifications of products for freight rate purposes, and result in fundamental changes in the freight rate structure for common carriers.

Conclusion.

Wherefore, a Writ of Certiorari to the Court of Appeal of the State of California, Second Appellate District, should issue so that the decision of said court in the instant cause may be reviewed by the Supreme Court of the United States.

ALFRED D. FREIS,
Attorney for Petitioner.

Service of the within and receipt of a copy thereof is hereby admitted this ..... day of March, A.D. 1977.

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Appendix to Petition for Writ of Certiorari to the Court of Appeal, Second Appellate District, State of California.

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APPENDIX

Page

Opinion of the Court of Appeal .....App. p. 1

Petition for Rehearing Denied 15

Order Denying Hearing After Judgment by the Court of Appeal, 2nd District, Division 5, Civil No. 47193 16

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APPENDIX.

Opinion of the Court of Appeal.

In the Court of Appeal of the State of California, Second Appellate District, Division Five.

Vacco Industries, a California corporation, Plaintiff and Respondent, v. Navajo Freight Lines, Inc., a corporation, Defendant and Appellant. 2d Civ. No. 47193, S.C. No. C 42419.

Filed: Oct. 29, 1976.

APPEAL from a judgment of the Superior Court of Los Angeles County. William A. Munnell, Judge. Affirmed.

Alfred D. Freis, for Defendant and Appellant.

Dunne, Shallcross & Kane, and Roy E. Harper, for Plaintiff and Respondent.

Appellant, Navajo Freight Lines, was the defendant in a suit brought by respondent, Vacco Industries, to recover losses for goods shipped by respondent and allegedly damaged in interstate transit by appellant carrier. The action was tried to the court, sitting without a jury, and proof was adduced that appellant had failed as common carrier to deliver the consigned machinery in an undamaged condition. The court took the case under submission and rendered a judgment for the respondent in the amount of $57,241.95 plus prejudgment interest and costs. A later motion for new trial brought by appellant was denied, whereupon appellant filed the instant appeal, contesting both liability and damages.

Facts

In the fall of 1970, Vacco Industries (hereinafter Vacco) completed work under a written contract with the U.S. Navy for a "Lube Pump Test Stand"—a sophisticated and unique piece of aircraft test machinery, and was prepared to have the equipment shipped to the Naval Air Station, Quonset Point, Rhode Island. In order to arrange transportation for the merchandise, an agent for Navajo Freight Lines (hereinafter Navajo) was contacted. After viewing the test stand, the agent saw no particular hazard in having the equipment shipped "as-is," and recommended that it simply be crated, and that each crate then be affixed to heavy wooden skids. The left, center, and right sections of the test stand were crated and skidded, without incident, and the equipment remained on the Vacco lot until it was finally loaded on the Navajo truck. The bill

of lading, later entered into between Vacco and Navajo, designated a declared value of $130,000, and the carrier acknowledged that the equipment possessed substantial inherent value to the shipper.

On September 25, 1970, the three wooden crates, together with one wooden box, totalling 11,760 pounds, were loaded by Vacco employees onto a flatbed truck dispatched by Navajo. The entire loading operation was viewed by representatives of both companies, and none of the observers noticed any injury to the items as they were placed on the truck. The Navajo driver signed the bill of lading, indicating that the goods were received without exception and in apparent good order. The truck then left Vacco and proceeded to the Navajo terminal in Los Angeles where the four pieces were transferred to three separate van trailers which took the equipment to Cleveland. There, the four pieces were loaded onto one van trailer and delivered to Quonset Point, Rhode Island. In the course of transit from Los Angeles to Quonset Point, there were at least three occasions on which the equipment was off-loaded and re-routed on separate vehicles.

The Vacco shipment arrived at the Naval Air Station in Quonset Point on October 5, 1970, and was accepted by the Naval shipping clerk without exception as to the external condition of the packing materials. In point of fact, however, it had been observed that a portion of one of the skids on the center unit had been broken off. The shipment was then placed on the Naval receiving dock, without injury to any of the equipment. Subsequently, the crates were moved by Naval personnel via forklift to another building several hundred yards away for unpacking. The Naval

inspector supervising this move indicated that it was accomplished with due care and without damaging any of the consigned merchandise.

When the crates bearing the test stand were removed by the Navy, it was found that two of the four units—the center and left sections of the test stand—were badly damaged. Vacco was immediately notified of this fact and the project engineer was dispatched to examine and report on the damaged consignment. In addition, an independent laboratory was hired to evaluate the damage for Vacco. Finally, on October 16, 1970, the Navy formally rejected the Lube Pump Test Stand, and recrated and returned the equipment to El Monte, California, for repairs at the Vacco facility. Upon completion of the repairs some months later, the test stand was returned to Quonset Point where it was ultimately accepted by the Navy pursuant to its original contract with Vacco.

At trial, respondent called to the stand its chief engineer, and the project engineer for the Lube Pump Test Stand, who testified that, after examining the equipment, it was their opinion that each section was damaged as the result of a drop during transit, which destroyed the structural integrity of the unit. Appellant put on its own expert who testified that, on the contrary, the units had sustained injury as the result of resonance vibration which occurred in the normal course of transit. On the issue of damages respondent itemized its direct repair costs, which, besides direct labor and materials, included incidental costs incurred in examining the damaged machinery, and in having it crated and shipped between Quonset Point and El Monte. In addition, an amount for overhead and general and administrative costs was assessed as part of the overall cost of repair. Finally, a ten percent profit was added onto the resulting figure as the price of this repair effort.

In the findings of fact and conclusions of law, the court held that the Lube Pump Test Stand was damaged in transit, while in the custody, care, and control of Navajo, and not as the result of inadequate preparation for shipment by Vacco. Judgment for plaintiff Vacco included all the aforementioned elements of damage attested to at trial.

Contentions

In support of a reversal of the judgment, appellant essentially argues that the evidence adduced by respondent was insufficient to make out a prima facie case of carrier liability under 49 U.S.C.A section 20, paragraph (11), and that in the alternative, conceding prima facie liability, an affirmative defense had been established—improper packing for shipment. Appellant also claims that even if it is liable without exception, certain items of damages were improper as special damages, or as items of damage not within the contemplation of the parties at the time the bill of lading was executed. From a clear appraisal of the record and applicable precedent we find that none of these contentions is well-taken.

Discussion

I

Both parties agree that liability in this case is governed by the Carmack Amendment to the Interstate Commerce Act (49 U.S.C.A, § 20, para. (11)). That law provides that an interstate carrier is liable for actual loss occasioned the shipper where goods delivered to the carrier are damaged in transit.[1] Three basic

[1]The applicable text of the statute reads as follows: "Any common carrier, railroad, or transportation company subject to the provisions of this chapter receiving property for transportation from a point in one State or Territory or the District

(This footnote is continued on next page)

elements comprise the shipper's prima facie case under this law: (1) that goods were delivered to the carrier in good condition; (2) that the shipment arrived at its destination in damaged condition; (3) the amount of actual losses. (*Valco Mfg. Co. v. Rickard & Sons* (N.J. App.) 92 A.2d 501, 503.) Once the shipper has established the elements of his prima facie case, negligence is presumed, and the carrier must show both that it was free from negligence, and that the damage was the product of one of the common law exceptions to liability. (*Missouri P. R. Co. v. Elmore & Stahl,* 377 U.S. 134, 138.)

The standards for reviewing the sufficiency of the evidence on appeal are well established. The reviewing court must consider the evidence in the light most favorable to the prevailing party, resolving any conflict in support of the judgment. (*Crawford v. Southern Pacific Co.,* 3 Cal.2d 427, 429; *Overton v. Vita Food Corp.,* 94 Cal.App.2d 367, 370.) Where the evidence is in conflict, the appellate court cannot disturb the findings of the lower court (*id.*), but where the record is silent, all intendments are indulged to support the judgment, and any error must be affirmatively demonstrated before a reversal is warranted. (*Walling v. Kimball,* 17 Cal.2d 364, 373; *Coleman v. Farwell,* 206 Cal. 740, 741.)

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of Columbia to a point in another State, Territory, [or] District of Columbia, . . . shall issue a receipt or bill of lading therefor, and shall be liable to the lawful holder thereof for any loss, damage, or injury to such property caused by it or by any common carrier, railroad, or transportation company to which such property may be delivered or over those line or lines such property may pass within the United States . . . when transported on a through bill of lading, and no contract, receipt, rule, regulation, or other limitation of any character whatsoever shall exempt such common carrier, railroad, or transportation company from the liability imposed; . . ."

The appellant first contends that respondent failed to affirmatively establish, as the first element of its prima facie case, that the equipment was delivered to the carrier in good condition. It is argued that the recital in the bill of lading, that the merchandise was received in "apparent good order" was not in itself sufficient evidence as to the condition of the units inside the crates, but rather speaks only to the condition of the crating itself. In urging this point, however, appellant takes a myopic view of the evidence. Without deciding the sufficiency of such evidence alone, we note that there was other testimony that points to the fact that the goods were in good condition at the time they were loaded onto appellant's truck. Such testimony indicated that the units were in good condition when first placed inside the crates, and that during the loading process itself, no damage was inflicted upon the crates. From this, it could properly be inferred that the goods were in fact in good condition at the time they were placed on the Navajo truck.

Appellant next disputes the sufficiency of respondent's case with regard to the second prima facie element —delivery of the goods by the carrier to the consignee in damaged condition. To this end, appellant marshals several assertions: first, that the court should not look beyond the clear receipt given the goods at their destination; second, that it was not positively established that the goods were not damaged as the result of mishandling by Naval personnel between the time of delivery and the time the goods were first inspected; third, that the testimony of Navajo's expert, finding vibration damage as the result of improper packing by the shipper, is to be accorded the most weight, since this expert was the only one experienced in evaluating freight

damages. Taking the foregoing assertions under consideration, we find that each is without merit.

It is true that when the crated units were first off-loaded at Quonset Point no exception was taken as to their condition by the Navy shipping clerk. This cannot be deemed, however, to foreclose any showing of in-transit damage, especially since such a receipt went only to the exterior crating, a detailed inspection of the contents of the crates being reserved until later. Further, appellant claims that the evidence shows that the goods were not in the same condition when they were unpacked by the Navy three days later as when they were first delivered by Navajo. Appellant points to testimony of Steven Buchanan, one of respondent's experts, as impeaching the testimony by the Naval operations officer as to the handling of the shipment. Buchanan testified that, just prior to the inspection by respondent, the crate containing the left hand section of the Lube Pump Test Stand was observed lying flat on the ground, apparently having slid over the skids upon which it was originally attached. According to appellant, this would support a finding that the damage to this section was sustained where it sat, as the result of mishandling by the Navy, and would impeach testimony as to the careful handling of the center section, as well. Despite authority cited by appellant,[2] it was not necessary for the respondent to *rule out* the possibility of damage to the crates after they were removed from the truck, as long as some evidence

[2]*Elder and Johnson Co. v. Commercial Motor Freight, Inc.*, 94 Ohio App. 358. In this case, the court noted that there was not a *scintilla of evidence* showing the care used in off-loading the crated merchandise, and thus the presumption of carrier negligence under the Carmack Amendment could not arise.

was presented upon which it could reasonably be concluded that due care was exercised by the consignee in handling the merchandise. The testimony by the Naval inspector, who controlled and supervised the movement of the crated goods upon arrival, establishes careful handling, and was reasonably accepted by the court as controlling on the issue of post-transit damage.

Turning now to the expert testimony given in this case, we cannot say that, as a matter of law, testimony by respondent's experts as to the cause of damage to respondent's equipment was inadequate to support a finding of carrier liability. Both of respondent's experts—the chief engineer and project engineer for the Lube Pump Test Stand—were intimately familiar with the construction of the equipment. Additionally, while they had had little experience in examining freight damage per se, each was a competent structural engineer with experience in stress analysis. On the other hand, while appellant's expert had similar credentials, and was experienced in evaluating freight damage, he was not familiar with the design of this particular piece of equipment, nor had he examined the damaged equipment firsthand; rather, his testimony was based upon examination of Navy photographs of the damages. In testifying from the photos, the expert even conceded that there was insufficient detail in the pictures to determine if the structural members were ripped apart as a result of a drop in transit. Undeniably his resonance vibration theory of damages had a less reliable factual basis than the theory propounded by the opposing experts. We find that the collective opinion of respondent's experts is the better reasoned and more percipient opinion, and properly led the court to the ines-

capable conclusion that the equipment was in fact dropped in transit. Thus, respondent did set forth a prima facie case of carrier liability under the Carmack Amendment (49 U.S.C.A., § 20, para. (11)), sufficient to sustain a judgment in its favor, unless respondent established such facts as might exempt it from liability under this law.

The five common law exceptions to the common carrier's liability for damaging goods in transit under the Carmack Amendment to the Interstate Commerce Act, are liability for injury caused by: (1) an act of God, (2) an act of the public enemy; (3) an act of public authority; (4) an act or omission of the shipper; and (5) the inherent nature of the goods. (*Secretary of Agriculture v. U.S.*, 350 U.S. 162, 165-166, n. 9.) Respondent claims that it was an omission of the shipper, *i.e.*, improper packing, or failure to internally brace its equipment, which caused the damage. But it has already been demonstrated in reviewing the expert testimony that the judge could properly have taken as true the opinions of respondent's engineers, that damage to the units was occasioned by a drop in transit, not by resonance vibration, and that the units had been properly crated for shipment without any internal bracing.[3] Thus, the trial judge properly found that appellant could not avail himself of the defense of improper packing.

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[3]Dr. Lancey, Vacco's chief engineer, had prepared calculations showing the structural adequacy of the frame and metal envelope supporting the Lube Pump Test Stand. He further stated that because of the strength of the framework in the center section and the number of resonant frequencies for each member of the console, there was no danger that any structural components might go into resonance.

Since the weight of the evidence supports a finding of liability, without any exception, the judgment finding appellant liable for damages under the Carmack Amendment was proper.

II

Excluding interest and costs, the trial court awarded respondent shipper damages in the amount of $54,-241.95. This sum was comprised of the following elements: (1) direct costs of $12,749.46, which, aside from materials, included these incidental expenditures: shipping costs of $3,803 (Quonset Point to Vacco and return), Navy packaging costs of $1200, a lab inspection fee of $500, an evaluation trip by the Vacco project engineer costing $481.57, and other miscellaneous costs of $2000; (2) direct labor costs of $8,256; (3) overhead of $15,521 (188% of the direct labor cost); (4) general and administrative costs of $12,-784.26 (35% of the first three items), and (5) profit of $4,931.07 (10% of the total repair costs). Respondent objects to the allowance of all incidental costs of repair, overhead, G & A, and the profit item, as inappropriate items of special damages, and, in the alternative, as being excessive. These objections will be taken up in order.

The Carmack Amendment provides for the recovery of "actual loss" for goods damaged by the carrier in transit. Reasonable costs of repair are recoverable as one of the alternative measures of damages for goods injured in transit, especially when the goods are unique in the marketplace—as is the case with the Lube Pump Test Stand. (*Conditioned Air Corp. v. Rock Island Motor Transit Co.* (Iowa) 114 N.W.2d

304, 307; see *Richards Mach. Co. v. McNamara Motor Express Agency, Inc.* (10 Cir. 1961) 295 F.2d 358, costs which are necessarily encompassed as actual losses under this measure of recovery are transportation costs to and from the place of repair (see *Olsen v. Railway Express Agency, Inc.* (10 Cir. 1961) 295 F.2d 358, 360), and, concomitantly, packaging costs in conjunction with such a shipment. Similarly, expenses incurred in examining a damaged shipment to ascertain the extent of olss prior to repair — in this case, the lab fee and evaluation trip, are recoverable actual losses incident to a repair effort. (*Campbell Soup Co. v. Darling Transfer Inc.* (U.S.D.C. Neb. 1961) 193 F. Supp. 408, 409; *Meletio Sea Food Co. v. Gordons Transports* (Mo. App. 1946) 191 S.W.2d 983, 986.) Insofar as these items of expense are the natural and probable consequence of the damage done to the goods, they cannot be classifed as "special damages," either in contract or in tort. (See *Conditioned Air, supra,* at p. 308.)

Indirect repair costs in the form of overhead and general and administrative costs (hereinafter G & A) may be recoverable actual losses for goods damaged in interstate transit to the extent that they are a reasonable allocation of the indirect costs of manufacturing an item. (*Conditioned Air, supra,* at p. 311; 14 Am.Jur. 2d, Carriers, § 644.) Appellant contends, however, that these figures were excessive insofar as the *Conditioned Air* court approved a figure which was a substantially lesser percentage of the direct costs than was the case here. It seems reasonable, though, that the allocation of such costs over the direct costs of manufacturing should be gauged in the context of the established practice of the individual business, as well as the particular industry of which that business

is a part. In the instant case, a Vacco executive testified that upon every contract which the company successfully negotiated with the government, many of which involved repair or refurbishing of aerospace equipment, a 200% burden and a 35% G & A was assessed against the direct costs of repair. Further, an expert in the government contracting field testified that the Vacco accounting practices with respect to overhead and G & A was consistent with accounting policies customarily employed in government and industry. In light of such a showing, we cannot hold, as a matter of law, that the overhead and G & A figures charged against the direct costs of repairing the Lube Pump Test Stand were excessive.

The ten percent profit on repairs allowed by the trial court, on first glance, seems somewhat more problematical than the foregoing items of damages. Relying on *Meletio Sea Food Co. v. Gordons Transports, supra,* 191 S.W.2d 983, 986, respondent claims that, considering the profit already earned by appellant on its underlying contract with the Navy, allowance of a profit on repairs would effect an impermissible double recovery. *Meletio* is distinguishable from the case at bar, however. There, the goods damaged in transit were fungible items manufactured by the shipper. A profit on top of the replacement cost of the items was disallowed. Here, we have a unique and sophisticated piece of equipment which required extensive repairs, and which, by virtue of the man hours necessitated, deprived the respondent shipper of other profitable business. Allowance of a reasonable profit on such a repair effort would not constitute a "double recovery," but rather would effect compensation for the direct and immediate consequence of the carrier's presumed negligence in damaging the consigned goods.

Thus, like the incidental costs of repair, the profit item is a recoverable item of general damages. (See *Martin v. Deetz,* 102 Cal. 55, 68; *Johnson v. Central Aviation Corp.,* 103 Cal.App.2d 102. See also *Texas and New Orleans Railroad Co. v. H. Rouw Co.* (Tex. Civ.App. 1954) 271 S.W.2d 666, 668 (phrase "full actual loss, damage, or injury to . . . property" in Carmack Amendment is not a statutory departure from common law rule of damages); 14 Am.Jur.2d, Carriers, § 649.)[4] Furthermore, as a form of lost profits, this item is not barred as being uncertain or speculative in amount, as Vacco was an established aerospace business with a history of profit-making. (See *L. W. Whitlock Truck Service, Inc. v. Regal Drilling Co.* (10 Cir. 1964) 333 F.2d 488 492.) Finally, the ten percent profit figure cannot be viewed as excessive, since the record establishes that it was a standard rate charged, and often realized, on most of Vacco's business, and was a rate which was both reasonable and competitive within the industry.

Thus, none of the damage items allowed by the trial court were either improper or excessive, and the judgment must be upheld in the amount specified.

The judgment is affirmed.

CERTIFIED FOR PUBLICATION

Stephens, *J.*

We concur:

Kaus, *P. J.*

Hastings, *J.*

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[4]Had Vacco had another company repair the equipment the "profit" charged in such repair would be recoverable by Vacco. We see no reason to reduce that portion of damage merely because Vacco accomplished the repair itself.

Los Angeles, Cal. Nov. 18, 1976

TITLE:

Vacco Industries vs. Navajo Freight Lines Inc. No. 47193.

The Court: Petition for Rehearing Denied.

CLAY ROBBINS, *Clerk*

Order Denying Hearing After Judgment by the Court of Appeal, 2nd District, Division 5, Civil No. 47193.

In the Supreme Court of the State of California, in Bank.

Vacco Industries v. Navajo Freight Lines, Incorporated.

Supreme Court filed: Dec. 22, 1976.

Appellant's petition for hearing DENIED.

Wright
Chief Justice

ALFRED D. FREIS,
Attorney for Petitioner.

Service of the within and receipt of a copy thereof is hereby admitted this ..... day of April, A.D. 1977.

Supreme Court, U. S.
FILED
APR 19 1977
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1977
No. 76-1307

NAVAJO FREIGHT LINES, INC., a corporation,
Petitioner,

vs.

VACCO INDUSTRIES, a California corporation,
Respondent.

On Petition for Writ of Certiorari to the Court of Appeal, Second Appellate District, State of California.

BRIEF IN OPPOSITION.

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SUBJECT INDEX

Page

Introduction 1

Opinion Below 2

Jurisdiction 3

Questions Presented 5

Statement of Case 6

Reasons for Denying the Writ 14

a. The Decision of the Trial Court Rests Upon an Independent Nonfederal Basis 14

b. The Evidentary Rulings of the Trial Court Were Correct and Supported by Substantial Evidence 15

c. The Damages Assessed Against the Petitioner Are in Accord With the Decisions Interpreting the Carmack Amendment to the Interstate Commerce Act 17

Conclusion 22

TABLE OF AUTHORITIES CITED

Cases — Page

Abrams v. Van Schaick, 293 US 188, 79 L ed. 278 5

Atlantic Coast Line Railway Co. v. Roe, 11 So. 155 ..... 17, 18

Baltimore Railway Co. v. Becker Mach. Co., 272 Fed. 933 18

Bandini Petroleum Co. v. Superior Court, 284 US ....., 76 L ed. 136 5

Buck v. California, 343 US 99, 96 L ed. 775 4

Campbell Soup Co. v. Carling Transfer Co., 193 F. Supp. 863 (D.C. Ore.) 20

Conditioned Air Corporation v. Rock Island Motor Transit, (1962) 114 N.W.2d 304 19

Continental Can Co. v Easor Express Co., (S.D.N.Y. 1964) 354 F.2d 222 18

Fawley Motor Lines v. Cavalier Poultry Corp., 235 F.2d 416 (4th Cir. 1956) 20

Galveston, H. & S. A. Ry. Co. v. Standard Rice Co., 34 S.W.2d 619 20

Henry v. Mississippi, 379 US 443, 13 L ed. (2d) 408 4

Illinois Cent. Railway Co. v. Crail, 281 U.S. 57, 50 S.Ct. 180 (1930) 19

Kolberg v. Cities Service, 343 Ill.App. 355 22

L. W. Whitlock Truck Service, Inc. v. Regal Drilling Co., 333 F.2d 488 (1964) 21

Page

Louisiana & Arkansas Ry. v. Export Drum Co., 359 F.2d 311 20

Meletio Sea Food Co. v. Gordons, 191 S.W.2d 983 (1946) 19

Meyer v. Buckman, 7 Ill.App.2d 285 22

Minnesota v. National Tea Co., 309 US 551, 84 L ed. 920 4

Olcovich v. Grand Trunk Ry. Co., 176 Pac. 459 ..... 19, 20

Olsen v. Railway Express Agency, Inc., 295 F.2d 358 (1961) 20

Process Equipment Co. v. Denver Chicago Trucking Co., 275 F.Supp. 698 (1967) 19

Railway Express Agency v. Smith, 212 F.2d 47 15

United States v. Palmers and Parker, 61 F.2d 455 18

Waters-Pierce v. Texas, 212 US 86, 53 L ed. 417 4

Western Machinery Exchange v. No. Pac. Ry. Co., 254 Pac. 248 20

Rules

Rules of the Supreme Court, Rule 19 3

Rules of the Supreme Court, Rule 19(1) 3

Statutes

California Code of Civil Procedure, Sec. 631.8 15

California Evidence Code, Sec. 600 16

	Page
California Evidence Code, Sec. 602	16
Uniform Straight Bill of Lading, Sec. 2(b)	13
United States Code Annotated, Title 49, Sec. 20 (11)	1, 14, 17
United States Code Annotated, Title 49, Sec. 319	2
United States Code, Title 28, Sec. 1257(3)	3

Textbook

American Jurisprudence, Carriers, Sec. 783	18

IN THE

Supreme Court of the United States

October Term, 1977
No. 76-1307

NAVAJO FREIGHT LINES, INC., a corporation,
Petitioner,

vs.

VACCO INDUSTRIES, a California corporation,
Respondent.

On Petition for Writ of Certiorari to the Court of Appeal, Second Appellate District, State of California.

BRIEF IN OPPOSITION.

INTRODUCTION.

This petition for writ of certiorari to review a decision of the court of appeal, second appellate district, State of California, is prosecuted by Navajo Freight Lines, Inc., as petitioner and defendant in the trial court below. The California superior court proceeding was initiated by Vacco Industries, a California Corporation, as party plaintiff. The cause of action sued upon has as its statutory authority the Interstate Commerce Act, and amendments thereto. This is commonly known as Section 20, paragraph (11) and is cited as Title 49 USCA 20, paragraph 11. This provides that the initial or the delivering carrier shall be liable to the lawful holder of a bill of lading for any loss, damage,

or injury to the property caused by it. Although the Carmack Amendment is found in Part I of the Interstate Commerce Act and originally applied to railroads and certain inland water carriers, Part II of the Interstate Commerce Act which was the Motor Carriers Act of 1935 incorporated this section by Section 319 thereof, the citation thereof being 49 USCA Section 319.

The theory of the respondent in the trial court was that Navajo Freight Lines, Inc. accepted from Vacco Industries a certain sophisticated piece of machinery for shipment in interstate commerce. This case was tried to the court, sitting without jury, wherein it was alleged and proved that Navajo Freight Lines, Inc. failed in its responsibility as a common carrier to deliver the consigned machinery to its point of destination in an undamaged condition, all of which was to respondent's loss and damage in the sum of $75,217.86. The court allowed $54,241.95 as cost of repair, $16,837.60 as prejudgment interest, and $4,-138.31 to the prevailing party as costs of suit.

The trial court decision was affirmed by the district court of appeal on October 29, 1976. A petition for rehearing in the same court was denied November 18, 1976. The petitioner then sought a hearing de novo in the California Supreme Court. That petition was denied December 22, 1976. The instant petition for certiorari followed.

OPINION BELOW.

The judgment of the court below is printed in Appendix to Petition for Writ of Certiorari to the Court of Appeal, Second Appellate District, State of California.

JURISDICTION.

Petitioner invokes jurisdiction of the Supreme Court of the United States under 28 U.S.C. § 1257(3), and Supreme Court Rule 19.

Respondent objects to the jurisdiction of the Court on the grounds that the decision sought to be reviewed presents no substantial federal question.

"1257. Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:

(3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution, treaties or statutes of or commission held or authority exercised under, the United States."

The petitioner makes the bald statement that jurisdiction is invoked under 28 U.S.C. § 1257(3), but it makes no showing or argument in support thereof. The failure of the petitioner to present with accuracy, brevity and clearness whatever is essential to show jurisdiction is a sufficient reason to deny the petition.

Sound judicial discretion calls for a denial of jurisdiction. A review on writ of certiorari is not a matter of right, but of sound judicial discretion and will be granted only where there are special and important reasons therefor. Supreme Court Rule 19(1).

Sound judicial discretion calls for a denial of jurisdiction because the decision of the State Court is not contrary to the decisions of the Supreme Court.

Harmonious state-federal relations are enhanced when this Court rejects review of a state court's decision on matters of peculiarly local concern.

The petition fails to demonstrate any reasons why this Court should undertake such a task that more fittingly belongs in a trial court.

The jurisdiction of the Supreme Court to review the proceedings of state courts is not that of a reviewing court on appeal, but is limited to the specific instances of denials of federal rights. *Waters-Pierce v. Texas,* 212 US 86, 53 L ed. 417; before the Court will entertain jurisdiction to review a judgment of a state court, is must affirmatively appear from the record that a real and substantial federal question was involved in the decision of the state court. Where the judgment of the state court rests upon two grounds, one of which is federal and the other nonfederal in character, the Supreme Court is without jurisdiction to review if the nonfederal ground is independent of the federal ground and adequate to support the judgment. *Minnesota v. National Tea Co.,* 309 US 551, 84 L ed. 920.

The Supreme Court will decline to review state Court judgments which rest on independent and adequate state substantive or procedural grounds, even where those judgments also decide federal questions. *Henry v. Mississippi,* 379 US 443, L ed. (2d) 408. The Supreme Court has ruled that the record must affirmatively demonstrate that the federal question was decided and that the decision was essential to the disposition of the case. *Buck v. California,* 343 US 99, 96 L ed. 775. The Supreme Court will not assume jurisdiction where it is at most conjectural whether the petitioner will be deprived of any constitutional right. *Abrams*

v. Van Schaick, 293 US 188, 79 L ed. 278. The general principle that appellate review is ordinarily limited to a determination whether there has been error at law, the trial court's decision of questions of fact being taken as conclusive in most circumstances is applicable to review by the Supreme Court. *Bandini Petroleum Co. v. Superior Court,* 284 US 39, 76 L ed. 136.

Applying the foregoing principles, it is clear that the petition now before the Court presents no substantial federal question. The petitioner would have this Court re-examine the rule of presumed negligence in motor-carrier cases. The rule is abundantly clear and requires no further explanation or pronouncement. At best, the petitioner disagrees with the trial court's assessment of the evidence. By the very questions raised in the petition, it is clear that issues of fact, not law, have been determined adversely to the petitioner. The evidentiary effect of presumptions, weight of expert testimony, and the quantum of damages are the factual questions raised by the petitioner. These very issues were decided on an independent, nonfederal basis which requires no review by this Court. This Court has spoken repeatedly on carrier liability under the Carmack Amendment. The ruling of the California district court of appeal is in accord with the decisions of this Court. Accordingly, the petition should be denied for lack of jurisdiction.

QUESTIONS PRESENTED.

Respondent disputes petitioner's recitation under Questions Presented. If the Court accepts jurisdiction, the issues succinctly stated are:

1. To what extent does the presumption of negligence apply in an interstate carrier case when a clear receipt is given by the consignee, where there is rehandling by the consignee prior to uncrating, but in the face of substantial evidence that the consignee exercised due care for the consigned property, and that the same was not damaged by the consignee?

2. Did the respondent establish a prima facie case of carrier liability?

3. By way of procedural matters, may the petitioner claim prejudice and discount its own expert who testified on cross examination that the damage to the consigned property occurred in transit and prior to delivery to the consignee?

4. Was the shipment properly prepared for shipment in view of the carrier's recommendations for crating and the carrier's acceptance of the property for shipment in interstate commerce?

5. Did the trial court judge properly assess and apportion damages against the interstate common carrier?

STATEMENT OF CASE.

For the sake of brevity, Navajo Freight Lines, Inc. and Vacco Industries, a California Corporation, will be referred to in the body of this brief as "Navajo" and "Vacco," respectively. The petitioner correctly states that six depositions of Anthony Zangari, William Lipscomb, Joseph Rega, Gerald Raymond, Rolland F. Hall and Stephen P. Grace were read in their entirety by the trial judge, and received in evidence as the court's Exhibit #1 [Rptr. Tr., p. 1, lines 10-28], pursuant to stipulation between counsel. These six depositions were taken with the prospect that the deponents

would not personally testify at time of trial, and that the trial Court would solely rely upon the import of the deposition transcripts in lieu of such testimony. The six depositions are important in that five of the six deponents worked or resided in proximity to Providence, Rhode Island, which was the point of destination of the consigned shipment. Each deponent, to some degree has personal knowledge as to the condition of the machinery, upon, and after it arrived at its point of destination, Naval Air Station, Quonset Point, Rhode Island.

Vacco entered into a written contract with the United States Navy for the design and fabrication of a "Lube Pump Test Stand" [Rptr. Tr., Vol. I, p. 128, line 11, to p. 129, line 3]. After award of contract, Vacco proceeded to discharge its contract obligation in accord with plans and specifications furnished by the United States Navy [Rptr. Tr., p. 216, lines 23-28, incl.]. The actual contract performance was rendered between 1968 and 1970 [Rptr. Tr., p. 8, lines 6-11]. The unit was completed in the fall of 1970, and was to be shipped to the Naval Air Station, Quonset Point, Rhode Island.

To secure transportation for the consigned test stand, Vacco had its shipping foreman, Manuel Perry, contact Navajo, a motor freight common carrier in interstate commerce. In that regard, Manuel Perry personally spoke with Lawrence Richardson, a sales and traffic representative for Navajo [Rptr. Tr., p. 10, line 7].

Mr. Lawrence Richardson made two visits to Vacco to view the consigned merchandise, and to review and make recommendations as to how the machinery should be crated and prepared for interstate travel [Rptr. Tr., p. 400, lines 2-7]. Richardson had 10 years experience in shipping and knew about the sufficiency of crating for interstate travel [Rptr. Tr. p. 415, line 23]. He recommended that the units be bolted to heavy wooden skids [Rptr. Tr., p. 401, lines 3-6], and stated that the crates were otherwise satisfactory [Rptr. Tr., p. 404, lines 6-9]. In essence, Richardson saw no shipping hazard [Rptr. Tr., p. 435, lines 2-8]. Had Navajo required other internal or external packing requirements, he would have pointed them out to Manuel Perry [Rptr. Tr., p. 428, lines 4-10]. Moreover, Navajo had the absolute right to reject such shipment if Richardson deemed it inadequate [Rptr. Tr., p. 415, lines 16-19].

The Lube Pump Test Stand did comply with the Naval specifications, and as built and prepared for shipment, could withstand the normal hazards of shipment [Rptr. Tr., p. 216, lines 23-28]. Richardson had discussions with Perry to the effect that the transportation would be made on a single truck [Rptr. Tr., p. 13, lines 2-5], which would be reserved exclusively for Vacco to the exclusion of other goods not forming the subject matter of the bill of lading [Rptr. Tr., p. 68, lines 2-4]. Perry told Richardson that Vacco did not want the machinery transferred from truck to truck during the course of transit to the East coast [Rptr. Tr., p. 62, lines 16-24], and Richardson guaranteed Vacco that this would not occur [Rptr. Tr.,

p. 65, lines 21-24; p. 412, lines 18-26]. Richardson visited the premises of Vacco on two occasions and observed the completed Lube Pump Test Stand. The skids and crating were observed by Richardson, who stated that each was sufficient to withstand the anticipated interstate transportation [Rptr. Tr., p. 13, lines 25-28]. Richardson did suggest that additional nails be placed in the crating. This was done [Rptr. Tr., p. 15, lines 7 and 8]. Manuel Perry personally observed the three units of the Lube Pump Test Stand being bolted to the skids [Rptr. Tr., p. 18, line 3]. Perry testified that the machinery was in "as new" manufactured condition, and showed no evidence of any damage [Rptr. Tr., p. 20, lines 23-24; p. 21, line 1-6].

Once the units were bolted to the skids, they were not moved prior to being received by the carrier's agent of September 25, 1970 [Rptr. Tr., p. 56, lines 11-13; p. 26, lines 23-27]. The actual bill of lading [Clk. Tr. p. 235] was prepared by Manuel Perry [Rptr. Tr., p. 24, lines 11-13]. Because the Lube Pump Test Stand was one of a kind, and possessed substantial inherent value, Lawrence Richardson, as agent for Navajo, advised Perry to place a "declared value" of $130,000.00 on the face of the bill of lading [Rptr. Tr., p. 60, lines 2-7]. This would insure careful handling in transit. The carrier acknowledged that it knew that Vacco placed great value upon the machinery by reason of the high declared value [Rptr. Tr., p. 420, lines 8-22]. On, or about, September 25, 1970, the truck driver for Navajo receipted the consigned articles, but questioned the declared value as excessive. Thereafter, after checking with Navajo, he proceeded to complete the bill of lading and signed it. The three

crates which were skidded, and one wooden box weighing a total of 11,760 pounds were loaded by Vacco employees onto a flatbed truck dispatched by Navajo. Representatives of Navajo and Vacco observed the entire loading process and observed no damage to the skids, crating or contents [Rptr. Tr., p. 23, lines 25-27]; the entire loading procedure was uneventful with no damage occurring at that time [Rptr. Tr., p. 26, lines 11-19; p. 57, lines 7-13]. The bill of lading signed by Henderson on behalf of Navajo indicated that goods were receipted without exception and found to be in apparent good order [Clk. Tr. p. 242].

The shipment was to be expedited by Navajo which meant that the merchandise would be delivered as fast as possible by the delivering carrier [Rptr. Tr., p. 431, lines 4-13]. Thereafter, the flatbed truck left Vacco and proceeded to the Los Angeles terminal of Navajo. The three wooden crates and one wooden box were shipped, two pieces on van trailer, A4352 to Cleveland, one piece on van trailer, A4113 to Cleveland, and one piece on van trailer, A4091 to Cleveland. At Cleveland, the four pieces were loaded on van trailer 1262 and delivered to Quonset Point, Rhode Island [Clk. Tr. pp. 248-252]. During the course of transit, the consigned merchandise was then offloaded and rerouted on separate vehicles at least on three occasions.

The shipment in question arrived at the Naval Air Station, Quonset Point, Rhode Island on, or about October 5, 1970, Joseph Rega, inspector for the Naval Air Station observed the receipt of the shipment and observed the presence of the damages skids [Clk. Tr.

p. 47, line 5, to p. 48, line 2]. From evidence advanced at the time of trial, it was determined that the shipment arrived and was accepted by the Naval shipping clerk, without exception as to the external condition of the packing materials [Court's Ex.—Deposition W. Lipscomb pp. 81-87]. During the course of the depositions, William Lipscomb was asked whether or not exception would have been taken, given the condition of the skid as evidenced by a series of exhibits denoted as Exhibit "F" 1-16. Lipscomb testified in all probability that he would not have taken exception to the condition of the wooden skids. It should be noted that Anthony Zangari, the delivering driver for Navajo, observed that no damage occurred during the unloading process. After the shipment was left on the receiving dock, it was moved by Navy personnel to Building 880, which was situated several hundred yards from the initial point of delivery. Joseph Rega, an employee of the Navy, testified that the shipment was observed by him at the time of its initial delivery, and subsequent delivery to Building 880. It is significant that only Rega testified as to the care and custody of the consigned property after arrival at the Naval Air Station, Quonset Point, Rhode Island. He stated, without reservation, that the merchandise was carefully handled by Naval personnel under his supervision. He states in his deposition that no damage to the consigned goods occurred while the same was in the possession of the Navy [Court's Ex.—Deposition of Joseph Rega].

Petitioner acknowledges such testimony at page 13 of Appellant's Opening Brief, lines 1-6. While appellant attempts to argue that the consigned property was damaged while in the custody of the United States

Navy, no witness testified that such was the case. In fact, the weight of testimony was that the merchandise was damaged while in transit and before delivery to the Naval Air Station in Rhode Island. No less than four persons testified at trial that the damage occurred in transit after it left California, and prior to arrival in Quonset Point, Rhode Island.

In the course of events, Vacco was contacted in California and advised of the damaged condition of the Lube Pump Test Stand [Rptr. Tr., p. 95, lines 20-28]. The United States Navy advised that two of the four units were badly damaged [Rptr. Tr., p. 96, lines 1-18], and thereafter, the Navy formally rejected said consigned property on October 16, 1970 [Clk. Tr. pp. 221-224, and pp. 167-169].

Vacco then directed one Steve Buchanan to fly to Rhode Island to examine the damaged consignment. In conjunction therewith, Mr. Buchanan prepared a "lube pump test stand" damage report, dated October 14, 1970 [Clk. Tr. pp. 167-169]. The observations of Mr. Buchanan, and Naval photographs [Ex. "F" 1-16] clearly show that the test stand had been dropped somewhere in transit prior to arrival in Rhode Island. Interestingly enough, Navajo offered no evidence of the care used by its drivers during the course of transit. Local pickup manifests and line driver logs were available, but petitioner did not produce them at the trial [Rptr. Tr., p. 428, lines 11-21; p. 443, line 14, to p. 444, lines 1-5].

The Navy then recrated the damaged Lube Pump Test Stand and the same was returned to California for repairs at the Vacco facility, located in El Monte, California. At the request of Navajo, Vacco accumu-

lated its costs while the repair work was in progress [Rptr. Tr., p. 270, lines 1-21; Clk. Tr. p. 217, paragraph 7].

A formal claim was made in accordance with Section 2(b) of the Uniform Straight Bill of Lading. The claim was declined by Navajo, and suit was filed on November 2, 1972. At the time of trial, Vacco adduced proof that the reasonable cost of repair was $54,241.95, along with pre-judgment interest and costs of suit.

REASONS FOR DENYING THE WRIT.

a. The Decision of the Trial Court Rests Upon an Independent Nonfederal Basis.

The complaint initially filed in this matter contained multiple causes of action. One of the causes of action was pled in negligence [Clk. Tr. p. 1]. In most interstate carrier cases, it is impossible to establish negligence in that the act complained of most always occurs out of the presence of the person shipping the property. For this reason, the Carmack Amendment was passed as an amendment to the Interstate Commerce Act. The amendment presumes negligence when the shipper establishes the following: the shipper establishes his prima facie case when he shows delivery in good condition, arrival in damaged condition, and the amount of damages. 49 U.S.C.A. § 20(11).

In this case there was abundant direct evidence of negligence without resort to the above statutory presumption. The direct evidence established by expert testimony was that the consigned property was dropped by the petitioner while in transit, and under petitioner's care, custody and control. The court concluded that the petitioner was negligent in that regard. Petitioner makes much of the presumption of negligence arising out of the Carmack Amendment. While the court was convinced that the presumption was established, the record is replete with direct evidence of negligence. The findings of fact and conclusions of law demonstrate that this was the case [Clk. Tr. p. 13].

The petitioner further claims that respondent failed to establish a prima facie case of carrier liability. The record on appeal demonstrates that the respondent had proven the following elements of its case by the

time it rested as to the case in chief: Good condition of the property upon receipt by the carrier; negligent handling of the property while in transit; damaged condition of the property upon delivery; and damages proximately caused. The respondent was required to prove nothing further to avoid a judgment of nonsuit (California Code of Civil Procedure § 631.8) in favor of the petitioner. Thus, the decision of the trial court was supported by an independent nonfederal basis. Despite assertions to the contrary, there is no need for this Court to re-examine the rule of presumed negligence on the part of the carrier. This is but an evidentiary device available to claimants wherein negligence cannot be established by direct testimony.

b. The Evidentary Rulings of the Trial Court Were Correct and Supported by Substantial Evidence.

If petitioner takes the position that the presumption of negligence should not have been applied by the trial court, it does so on the mistaken assertion that a prima facie case had not been established. Obviously, the petitioner contends that the clear receipt given by the receiving clerk precludes the application of the presumption in that the damaged condition of the property upon delivery could *never* be established. The clear receipt is only prima facie evidence that the contents of the crates were in good condition, because no written exceptions to condition at delivery were taken by the consignee. Like any other receipt, the facts may be established by the weight of the evidence that the receipt did not properly reflect the actual condition of the goods at the time of delivery. *Railway Express Agency v. Smith*, 212 F.2d 47. One must remember that a presumption is an assumption

of fact that the law requires to be made from another fact or group of facts found or otherwise established in the action. California Evidence Code § 600. From the evidence which established negligent handling and damage in the course of transit, along with the evidence that the consignee carefully handled the property without causing damage after receipt, the trial court could, and did, reasonably conclude that the consigned property was in a damaged condition, albeit concealed, when delivered to the consignee. Petitioner had an opportunity to rebut the presumption once it was established. California Evidence Code § 602. Petitioner tried to establish that the damages occurred after delivery to the consignee, or by reason of the way in which the property was prepared for shipment. Further, the petitioner argued the effect of rehandling of the property by the consignee. Despite the efforts made by the petitioner, it was unable to rebut the presumed negligence. The trial judge correctly determined that the shipper and consignee did nothing to cause or contribute to the damage of the consigned property.

Another evidentiary matter concerning petitioner is the subject of expert testimony. Petitioner claims some prejudice by reason of the testimony adduced from the petitioner's expert by respondent's counsel. It is certain that petitioner's theory of the case by defense was greatly impaired by the testimony given by Charles Avery, Ph.D. Doctor Avery testified in effect that the damage to the consigned property occurred in the course of transit and before delivery. Whether the witness was improperly prepared to testify in support of petitioner's theory of the case is unknown, but such testimony did impeach the argument surrounding the clear receipt and was found to be probative by the court.

This testimony was prejudicial to the petitioner's case, but the manner in which it was introduced is in accord with California evidentiary rules.

c. The Damages Assessed Against the Petitioner Are in Accord With the Decisions Interpreting the Carmack Amendment to the Interstate Commerce Act.

The petitioner asserts that the damages sustained by respondent were improperly assessed against it by the trial court. Section 20, paragraph 11, of part I of the Interstate Commence Act (which is applicable to rail and motor carriers and freight forwarders) provides, in part, as follows: "That any common carrier . . . (operating in interstate commerce) . . . shall issue a receipt or bill of lading . . . and shall be liable to the lawful holder thereof for any loss, damage, or injury to such property caused by it or any common carrier . . . to which such property may be delivered . . . and no contract, receipt, rule, regulation, or other limitation of any character whatsoever shall exempt such common carrier . . . from the liability hereby imposed; and any such common carrier *shall be liable* to the lawful holder of said receipt or bill of lading or to any party entitled to recover thereon . . . for the *full actual loss, damage or injury to such property* caused by it or any such common carrier . . ." (Emphasis added).

As stated in the *Atlantic Coast Line Railway Co. v. Roe,* 11 So. 155, "The basic thought underlying the federal statutes which define the liability and prescribe the measure of damages in cases of this kind is that the owner shall be made whole by receiving the proper money equivalent for what he has actually

lost, or, in other words, to restore him to the position he would have occupied, had the carrier performed its contract." How have the Courts interpreted the phrase "full actual loss, damage or injury?" For the sake of argument, it will again be stated that the lube pump test stand was one of a kind, and there was no established market value for the same other than the contract price to be paid by the United States Navy. The Vice President of Vacco testified that the actual cost to Vacco for the fabrication of the unit exceeded the Navy contract price, because the unit was in the nature of a prototype involving much research and development.

Where there is no market value as such, the shipper has often been able to recover on another basis if more appropriate. See *United States v. Palmers and Parker,* 61 F.2d 455; *Baltimore Railway Co. v. Becker Mach. Co.,* 272 Fed. 933. The reasonable cost of repair is an appropriate measure of that loss where the property is not a total loss, but can be, and is repaired, and the cost of repair is not out of proportion to the value of the property. *Continental Can Co. v. Easor Express Co.,* (S.D.N.Y. 1964) 354 F.2d 222. In *Am. Jur., Carriers,* Sec. 783, a summary of the law is given as follows:

> "The contract price, rather than the market value of goods may constitute the proper basis for estimating the damages for their loss or injury where they are shipped under, or pursuant to, a contract of sale. . . . Where the contract price is the only evidence of the market value it should be taken as the measure of damages."

If it is apparent that the shipper would have received a profit without any additional undertaking if the goods had been delivered complete and in good order, then the shipper has *earned* a profit which he is entitled to recover. It should be remembered that a manufacturer by the very process of manufacturing usually produces a product which is valued in excess of its cost of manufacture. Our entire distribution system embraces the selfish motive of profit and usually the movement of commercial goods is for the very purpose of realizing a profit (Emphasis added).

In a good number of cases, the shipper has been allowed a measure of recovery based upon the invoiced sales price to the consignee less applicable discounts. *Illinois Cent. Railway Co. v. Crail,* 281 U.S. 57, 50 S.Ct. 180 (1930); *Meletio Sea Food Co. v. Gordons,* 191 S.W.2d 983 (1946).

It is undisputed in this appeal that in arriving at the true cost of repair, respondent sought recovery for direct costs, direct labor, to which was assessed a burden of 188%, general and administrative expenses, and of course, profit [Rptr. Tr., pp. 276-294]. "Full actual loss" does include the cost of repair and an allowance for operations and overhead. The charge must be determined as each case presents its peculiar circumstances (Emphasis added). *Conditioned Air Corporation v. Rock Island Motor Transit,* (1962) 114 N.W.2d 304. *Process Equipment Co. v. Denver Chicago Trucking Co.,* 275 F.Supp. 698 (1967), also allows direct and indirect costs. The carrier is liable for the reasonable cost of repairing damaged merchandise. This not only includes cost of labor and material but may also include a reasonable amount for *overhead. Olco-*

vich v. Grand Trunk Ry. Co., 176 Pac. 459; *Galveston, H. & S. A. Ry. Co. v. Standard Rice Co.*, 34 S.W.2d 619; *Western Machinery Exchange v. No. Pac. Ry. Co.*, 254 Pac. 248. Other cases have also held that "full actual loss" also includes transportation costs to place of repair and return, together with allowance for depreciation, if any. *Olsen v. Railway Express Agency, Inc.*, 295 F.2d 358 (1961). Moreover, other cases have allowed the shipper to recover from the carrier those expenses incurred in determining marketability and salvage value of products damaged in transit. *Campbell Soup Co. v. Carling Transfer Co.*, 193 F. Supp. 863 (D.C. Ore.).

The Trial Court also awarded pre-judgment interest in the amount of $16,837.60. Such allowance is proper. *Louisiana & Arkansas Ry. v. Export Drum Co.*, 359 F.2d 311; *Fawley Motor Lines v. Cavalier Poultry Corp.*, 235 F.2d 416 (4th Cir. 1956).

Now, in applying these general propositions of law, were the damages as allowed proper under the circumstances of this case? This case is unique in that the Lube Pump Test Stand was not a fungible item of merchandise easily subject to replacement or repair. The test stand was one of a kind, and Navajo was placed on advance notice by the $130,000.00 declaration that the machinery was of tremendous value. Navajo now argues that an application of a burden rate of 188% to direct labor is excessive, along with the general and administrative markup of 35%. There can be no dispute in view of the case law that overhead, in some amount or by some generic description is warranted and allowed in the motor carrier cases.

William Tolley, Vice President of Vacco, testified in chief, as to the record keeping procedures at Vacco. Moreover, he stated that the values allocated to burden (as indirect support to direct labor), along with G and A, and profit were the same under the original contract with the Navy, as with the repair work which commenced in the fall of 1970. It would be incongruous to demand the shipper to perform the repair work at cost and without overhead, when the original construction was priced out differently to the Navy. Petitioner was given the opportunity to challenge the reasonableness of the allocated burden and the percentage of general and administrative expenses claimed. No such testimony was adduced by Navajo. The respondent called one Vincent Page as an expert in the field of government contracts, who cogently testified that the rate assigned to burden, G and A, and profit are consistent with accounting policies customarily employed in government and industry [Rptr. Tr., p. 357, line 12, to p. 359, line 20]. Since the accounting procedures used by Vacco have been employed in literally hundreds of contracts in government and industry, all of which are subject to close audit and control, what evidence was introduced by Navajo that indicates that the rates for these overhead figures was either excessive or unreasonable? While Navajo characterizes the overhead rates as "special damages," no citation to authority or trial testimony supports such a characterization.

As to the 10% profit figure, the same is neither remote nor speculative, especially given the fact that Vacco had been in existence for some period of time and has a history of profit making. See *L. W. Whitlock Truck Service, Inc. v. Regal Drilling Co.*, 333 F.2d 488 (1964) Where loss of profit is the natural probable

consequence of the act or omission complained of, such profits may be recovered if established with certainty. *Meyer v. Buckman,* 7 Ill.App.2d 285; *Kolberg v. Cities Service,* 343 Ill.App. 355.

Moreover, to the extent that the Court would construe any of the damages as "special damages," such damages are customarily granted when the carrier has prior knowledge they are reasonably likely to occur, if the consigned property were damaged in transit. In this case, the carrier was indeed placed on notice as to the special circumstance from which damage would flow, namely, the declared value of $130,000.00 and the request for expedited delivery.

CONCLUSION.

For the foregoing reasons, respondent Vacco Industries, a California corporation, prays that the petition of petitioner, Navajo Freight Lines, a corporation, for a writ of certiorari be denied.

DATED: April 18, 1977

Respectfully submitted,

DUNNE, SHALLCROSS & KANE,
ROY E. HARPER,

Attorneys for Respondent
Vacco Industries.

Service of the within and receipt of a copy thereof is hereby admitted this ..... day of May, A.D. 1977.

Supreme Court, U. S.
FILED
MAY 10 1977
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1976
No. 76-1307

NAVAJO FREIGHT LINES, INC., a corporation,

Petitioner,

vs.

VACCO INDUSTRIES, a California corporation

Respondent.

REPLY BRIEF.

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SUBJECT INDEX

	Page
Reply Brief	1
Conclusion	6

TABLE OF AUTHORITIES CITED

Cases

Buck v. California, (1952) 343 U.S. 99, 96 L.Ed. 775	2
F. J. McCarthy Co., Inc. v. Southern Pacific Co., (1970) 428 F.2d 690	5
Hangar v. Allied Van Lines, Inc., (1964) 203 A.2d 420	3

Rules

Rules of the United States Supreme Court, Rule 19	2
Rules of the United States Supreme Court, Rule 24(4)	1

Statutes

United States Code, Title 28, Sec. 1257(3)	1
United States Constitution, Art. 1, Sec. 8, cl. 3	3

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REPLY BRIEF.

Under Rule 24(4) of the Supreme Court Rules, Reply Briefs directed to arguments first raised in the Briefs in Opposition may be filed. Accordingly, the comments in this brief will be restricted to arguments first raised in the Brief in Opposition hereinbefore filed by respondent.

Respondent first complains that no showing or argument in support thereof is made for invoking the jurisdiction of the Supreme Court under 28 USC 1257(3). In the Petition itself, immediately after the statement is made that said section confers jurisdiction, reference is made to the Carmack Amendment to the Interstate Commerce Act as the statute of the United States determining the rights of the parties. Since the determination of the lawsuit involved a determination of the rights of the parties under the Carmack Amendment, jurisdiction of the Supreme Court of the United States to review that decision arises.

On page 3 of the Brief in Opposition, respondent states the point that because the decision of the state court is not contrary to the decision of the Supreme Court, the Supreme Court ought not to take jurisdiction. Respondent's view finds no support in Rule 19, Supreme Court Rules, under paragraph 1. Subparagraph (a) of Rule 19 supports the granting of the Writ when the state court has decided a federal question of substance not theretofore determined by the Supreme Court, or has decided it in a way probably not in accord with applicable decisions of the Supreme Court. Reference to the questions presented in the Petition reflect questions on interstate commerce not previously decided by the Supreme Court of the United States.

Respondent's attempt, commencing at page 4, to show that the lower court decision in this case is based on matters of peculiarly local concern is not appropriate to the facts of this case. The cases cited by respondent at pages 4 and 5 of the Brief in Opposition with one exception were decided under the law of the state involved, under a state statute initially and the questions arose whether the petitioner's rights therein under the Federal Constitution or statute were sufficiently involved to give the Supreme Court the right to review. Those cases are not this case. The exception is the case *Buck v. California,* (1952) 343 U.S. 99, 96 L.Ed. 775. This case involved a San Diego County ordinance regulating taxicabs carrying passengers from Mexico to San Diego requiring a written application for a permit, payment of a $1 fee, and compliance with certain standards relating to the public safety. The court said that though Congress had partially excluded taxicabs from regulation and had provided minimum regulation over taxicabs, the state could,

in the exercise of its police power, provide additional consistent regulations which will stand together with those enacted by Congress. This is a different type of regulation than is involved in the mainstream of interstate freight shipments, a field which Congress has preempted. *Hangar v. Allied Van Lines, Inc.,* (1964) 203 A.2d 420.

Congress derives its powers to regulate interstate commerce from the Constitution of the United States which in Article 1, Section 8, clause 3 provides that Congress shall have power to regulate commerce . . . among the several states. . . . This has been interpreted to give Congress exclusive power to regulate commerce except for non-discriminatory regulation by the states in the nature of the exercise of police power or taxing power of a nature that does not constitute a burden on interstate commerce.

The Carmack Amendment to the Interstate Commerce Act and the remainder of the Interstate Commerce Act reflect the intention of Congress to preempt by federal legislation the field of interstate commerce. The state court system, in determining the rights of the parties to this lawsuit under the Federal Statute, acted as a court system having concurrent jurisdiction with the federal courts in construing the rights of said parties created by federal statute. There is no right of peculiarly local concern involved in this case, except the procedural rights involved in any determination in the state court system.

Reference is made in the Brief in Opposition at page 16 thereof to the testimony of Charles Avery, witness for the defendant, Navajo. Said witness testified in effect that the damage to the concerned property

occurred during transit without negligence on the part of the defendant by reason of the fact that such damage was the result of normal handling and normal vibration induced into the cargo from the truckbed, and that the damage occurred because of improper packing by the shipper in that there was no internal bracing of the shipment which would have served as a damping and cushioning agent to absorb and render ineffective the vibration induced into the shipment from the roadbed through the trailer. His testimony did not in any respect support damage by improper handling by the carrier but rather fully supported damage as the result of improper packaging by the shipper. Such testimony ought not to be available to the respondent to establish its *prima facie* case, yet, under California statutes such testimony by defense experts, even when it is opinion evidence only, is not only discoverable, but in this case was used to establish respondent's *prima facie* case that the shipment was damaged in transit before delivery to the consignee even though there was no other evidence, apart from opinion evidence, that the shipment was actually damaged at the time of delivery. Damage in transit which occurs as the result of the shipper's improper packing of the shipment is not a basis for judgment against the carrier.

A declaration of value stated on the face of the bill of lading, as it was in this case, does not put the carrier on notice that special damages will result to the shipper if the shipment is damaged in transit.

Mr. Tolley, of respondent, stated that the declaration of value of $130,000.00 for the shipment was typed on the bill of lading to avoid the settlement by the carrier of a claim for damage by respondent at the rate of 10c per pound [Rep. Tr., Vol. II, p. 369,

lines 9-16]. Respondent was thus under the mistaken belief that the carrier would endeavor to settle its claim for damages in transit, if carrier damage occurred, at a maximum amount of $1,100.00 if the declaration had not been put on the bill of lading, based on a total weight of 11,000 pounds.

Declarations of value on a bill of lading serve only one purpose. If the declaration is low enough and if the carrier provides in its tariffs a lower rate based on the lower declaration of value, then the shipper is entitled to the lower freight rate. If a declaration of value is placed on a bill of lading in which there is no special rate based upon the declared value of the shipment, the declaration is surplusage and is ignored by the carrier in handling the shipment. Damages which a shipper is entitled to recover if a shipment is damaged in transit as a result of carrier negligence result from other aspects of a carrier-shipper relationship than the declared value stated on the bill of lading. The maximum amounts for which the shipper may recover are those which were within the contemplation of the parties at the time they entered into the original bill of lading. *F. J. McCarthy Co., Inc. v. Southern Pacific Co.*, (1970) 428 F.2d 690, at page 693.

Of the items claimed in this case by the shipper only direct costs of approximately $14,000.00 and a reasonable amount of overhead, only an amount approximating an additional $2,000.00, so qualify. Approximately $32,000.00 of overhead and prejudgment interest thereon does not so qualify. They were special damages and should have been classified as such as a matter of law.

Conclusion.

Petitioner prays that the Writ of Certiorari issue.

Respectfully submitted,

ALFRED D. FREIS,

Attorney for Petitioner,